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No. 433

In the Supreme Court of the United States

OCTOBER TERM, 1967

CITY OF POTTSVILLE, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

THURGOOD MARSHALL,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This is an appeal from an order denying an application by appellant, City of Pottsville, for leave to intervene as a plaintiff in *Borough of Moosic* v. *United States, et al.*, Civil Action No. 10054, now pending in the United States District Court for the Middle District of Pennsylvania. Appellant is a municipal corporation located in Schuylkill County, Pennsylvania. The original plaintiff, the Borough of Moosic, located in Lackawanna County, Pennsylvania, is seeking to annul and set aside the orders of the Interstate Commerce Commission (a) authorizing merger of the Pennsylvania Railroad Company and

274-500—67

the New York Central Railroad Company ("Penn-Central")[1] and (b) requiring the inclusion of the Erie-Lackawanna Railroad Company, the Delaware & Hudson Railroad Company and the Boston and Maine Corporation in the Norfolk and Western system ("The *Inclusion* Case").[2] The two orders by the Commission relate to the remand by this Court, last term, of *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372, in which the Court ordered the Commission not to permit the Penn-Central merger to be consummated until the future of the Erie-Lackawanna, the Delaware & Hudson, and the Boston and Maine railroads was determined (see *id.* at 378 and 390). Neither the United States nor the Interstate Commerce Commission expressly opposed appellant's intervention in the court below.[3] It was denied intervention by the court on the ground that "the city of Pottsville is not located in this District (28 U.S.C. § 1398) and the defendant has objected to parties raising their objections to these I.C.C. Orders other than in the Southern District of New York * * *" (J.S. App., p. 9a).

The action below was commenced on June 26, 1967, more than nine months following the commencement of

[1] *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 330 I.C.C. 328 (June 9, 1967).

[2] *Norfolk & Western Ry. Co. and New York, Chicago & St. Louis R. Co.—Merger, etc.*, Finance Docket No. 21510, decided June 9, 1967.

[3] Appellant was a party in interest in the Penn-Central merger proceedings before the Commission (J.S., pp. 3–4) and under 28 U.S.C. 2323 would be entitled to intervene in any judicial action seeking to set aside the Commission's order in that case.

the original *Penn-Central* action in the Southern District of New York.[4] In the belief that judicial review of the June 9 Commission orders will be expedited by litigating all challenges to those orders in a single forum, the United States and the Commission have urged all parties to present any claims against these orders in the Southern District of New York.[5] To that end we have moved in the court below to stay further proceedings in the *Moosic* case until further order of that court.[6] The New York court has presently pending before it two actions, the original *Penn-Central* case, *Erie-Lackawanna R. Co.* v. *United States,* 66 Civ. 2860, 66 Civ. 2903, 66 Civ. 2914, S.D.N.Y.,[7] and a suit challenging the *Inclusion* order, *Delaware & Hudson R. Corp.* v. *United States,* 67 Civ. 2451, S.D.N.Y. The three-judge court below, on July 13, 1967, stayed its proceedings until October 1, 1967, by which time both the *Penn-Central* and the

[4] *Erie-Lackawanna* v. *United States*, 259 F. Supp. 964 (S.D.N.Y.), reversed *sub nom. Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372.

[5] The United States and the Commission have stipulated in open court in the Southern District of New York that no objection to venue will be interposed against any party litigating in that forum.

[6] A similar motion was filed in *Norfolk & Western Ry. Co.* v. *United States*, No. 67-C-51-R, W.D. Va., an action filed on June 13, 1967, by the Norfolk & Western railroad challenging the *Inclusion* order.

[7] This is the consolidated action originally filed on September 8, 1966, which this Court remanded to the district court on March 27, 1967. *Baltimore & Ohio R. Co.* v. *United States*, *supra*, n. 4.

Inclusion cases will have been heard in New York (J.S. App., p. 8a).[8]

Appellant applied for leave to intervene in the court below on June 27, 1967. Its attack on the two Commission orders is identical to those of plaintiff and intervening plaintiffs in the action below.[9] Although appellant is not a party to the proceedings in New York, the three-judge court there granted it leave to intervene in the pending New York actions by August 2, 1967.[10] It has not done so.

As the court below observed, the complaint in the *Moosic* case "is virtually identical with the complaint of [Milton J. Shapp and the City of Scranton] intervening plaintiffs in [*Erie-Lackawanna* v. *United*

[8] Final hearings are now set before the same three-judge panel in the Southern District of New York for September 18, 1967, in *Erie-Lackawanna* v. *United States*, *supra*, and for September 28, 1967, in *Delaware & Hudson* v. *United States*, 67 Civ. 2451, S.D.N.Y., the *Inclusion* case in which Boston & Maine and Erie-Lackawanna have intervened and Norfolk & Western has been joined under Fed. R. Civ. P. 19(a).

The Virginia court in *Norfolk & Western* v. *United States*, *supra*, n. 6, expressed the view that Norfolk & Western's attack against the *Inclusion* order should be heard by the New York court because of its close relationship to the Penn-Central merger case. The case has been temporarily stayed and further proceedings to determine the duration of the stay are now pending.

[9] Appellant's proposed complaint was jointly submitted with the City of Scranton, intervening plaintiff below, and incorporates by reference all the pertinent allegations in the complaint filed by plaintiff Borough of Moosic.

[10] See Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp, *Erie-Lackawanna R. Co.* v. *United States*, *supra*, S.D.N.Y., decided July 26, 1967.

States] 66 Civ. 2860 [11] insofar as such complaints attack the Penn-Central merger." (J.S. App., p. 5a.) Other matters raised in ***Moosic,*** as the court below observed, can also be raised in the New York case (*Ibid.*) Furthermore, the attack on the *Inclusion* order in the *Moosic* case is directly grounded on the relationship between the Penn-Central merger and the need for protection of the Erie-Lackawanna and the Delaware & Hudson railroads.[12]

The United States and the Commission believe that all questions relating to the Penn-Central merger should be be heard in the Southern District of New York where the original action to set aside the Commission's approval of that merger began, and that in view of this Court's decision in *Baltimore & Ohio R. Co.* v. *United States, supra,* the *Inclusion* case should be heard there as well. To this end, the proceedings below should be stayed while the actions in New York go forward. However, subject to this condition, we have no objection to appellant's intervention in the court below.

---

[11] In staying its own proceedings while the earlier-filed case in New York raising virtually the same issues proceeded to final determination, the district court correctly applied the principle that "the court which first has possession of the subject must decide it." *Smith* v. *M'Iver*, 9 Wheat. 532, 535. See, also, *Kansas City Southern Ry.* v. *United States*, 282 U.S. 760; *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929–930 (C.A. 3).

[12] The third protected railroad, the Boston & Maine, does not operate in the Commonwealth of Pennsylvania. According to appellant's proposed complaint in intervention, the City of Pottsville is served by the Reading Company and the Pennsylvania Railroad Company.

The lower court evidently believed that the opposition of the United States and the Commission to the presentation of claims against the Commission's merger and inclusion orders in any court other than the Southern District of New York constituted an objection to appellant's formally becoming a party in the *Moosic* case. This is not the case. Since the parties are not in dispute as to appellant's formal right to participate in the action below, we suggest that the order of the district court denying appellant's application for leave to intervene be vacated and that the case be remanded to that court where appellant would then be afforded an opportunity to renew its application for intervention.[13]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

AUGUST 1967.

[13] The United States and the Commission have proposed that appellant renew its application for intervention in the district court. We shall interpose no objection to such application. Letters to appellant's counsel setting forth this proposal are included in the Appendix.

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE,
Washington, D.C. 20530,
August 21, 1967.

[SEAL]
Address Reply to the
Division Indicated
and Refer to Initials and Number
EMZ: HES
59-12-1376

GORDON P. MACDOUGALL, Esquire
705 Ring Building,
Washington, D.C. 20036

Re: *City of Pottsville* v. *United States,* No. 433; *Borough of Moosic* v. *United States,* No. 10054 (M.D. Pa.)

DEAR MR. MACDOUGALL: This will acknowledge receipt of the Jurisdictional Statement you filed on behalf of the appellant in No. 433, *City of Pottsville* v. *United States.*

While adhering to its view that challenges to the orders of the Interstate Commerce Commission authorizing consummation of the Penn-Central merger and directing the inclusion of the Erie-Lackawanna, Delaware & Hudson, and Boston & Maine railroads in the Norfolk & Western system should be raised in the pending actions in the United States District Court for the Southern District of New York, the United States has no objection to the City of Pottsville formally becoming a party to the *Moosic* case now pending in the United States District Court for the Middle District of Pennsylvania by way of intervention. We also adhere to our view, however, that

the *Borough of Moosic* case should be stayed pending disposition of the proceedings in New York.

In order to facilitate resolution of this matter and to avoid unnecessary imposition on the time of the Supreme Court of the United States, the City of Pottsville might consider withdrawing the Notice of Appeal filed in the district court with a simultaneous renewal of its application for leave to intervene. The United States will interpose no objection to the granting of that motion. The appeal can then be dismissed under Rule 60(1) of the Supreme Court Rules.

Sincerely yours,

EDWIN M. ZIMMERMAN,
Acting Assistant Attorney General,
Antitrust Division.

By: HOWARD E. SHAPIRO,
Acting Chief,
Appellate Section.

cc: All parties

APPENDIX B

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., 20423, August 11, 1967.
FRK:ch

REGISTERED MAIL
GORDON P. MACDOUGALL, Esq.
705 Ring Building,
Washington, D.C., 20036

Re: *Borough of Moosic* v. *United States,* C.A. No. 10054 (M.D. Pa.) (G.C. File No. 2267)

DEAR MR. MACDOUGALL: This is to acknowledge receipt of the Jurisdictional Statement of the City of Pottsville filed on or about July 31, 1967, in the Supreme Court of the United States. We, of course, anticipate filing a response to that pleading.

It occurs to us, however, that the matter of the intervention of the City of Pottsville in the subject case might better be handled by its again petitioning the district court for leave to intervene, rather than by its appealing to the Supreme Court, with the attendant imposition upon the time and facilities of that court. If the City of Pottsville were to seek intervention in the district court, we, of course, would not oppose its application.

Very truly yours,

FRITZ R. KAHN,
Associate General Counsel.

cc: All parties

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IN THE

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OCTOBER TERM, 1967

No. 433

CITY OF POTTSVILLE,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

RESPONSE OF APPELLANT TO MEMORANDUM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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September, 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 433

CITY OF POTTSVILLE,

Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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RESPONSE OF APPELLANT TO MEMORANDUM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

This response is submitted in answer to the memorandum of the United States of America and Interstate Commerce Commission suggesting that the order of the

district court be vacated and the case be remanded to that court, but conditioning its suggestion with "the proceedings below should be stayed while the actions in the Southern District of New York go forward." The conditional suggestion of the U.S. and I.C.C. is not acceptable since it would afford appellant no real relief and still presents the issue of the stay to compel the appellant to resort to the New York court, which is one of the two reasons for the denial of the intervention (J.S. App. B, p. 9a). Thus the underlying question before the Court is whether the appellant can only proceed in another forum where two separate actions are going on, notwithstanding the basic position of the appellant of its right to proceed in a forum in its State to attack the inextricably intertwined I.C.C. orders in one action.

For the reasons just stated, other parties to the district court proceeding in Pennsylvania have applied for mandamus or certiorari in this Court on September 15, 1967 in Nos. 663 and 664 Misc. to review the failure of the district court to proceed with judicial review of the two I.C.C. orders in one proceeding. Nine copies of the pertinent documents already filed with the Court in those proceedings are being lodged with the filing of this response.

Appellant respectfully suggests that the order of the court below denying intervention be reversed and that the court below be directed to allow intervention and to

hear and determine the appellant's attacks in its action against the two disputed I.C.C. orders.

Respectfully submitted,

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Attorney for Appellant

Of Counsel:

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September, 1967

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Supreme Court of the United States

October Term, 1967

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

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Section 2284 ..... 2, 4

Section 2321-25 ..... 2, 4

Interstate Commerce Act, 49 U.S.C.:

Section 5(1) 4

Section 5(2) 3, 4

Section 5(9) 4

Supreme Court of the United States

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v.

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On Appeal from the United States District Court for the Southern District of New York

---

JURISDICTIONAL STATEMENT

The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and Western Maryland Railway Company, appeal from the judgment of the United States District Court for the Southern District of New York, entered on October 19, 1967, dismissing appellants' complaint seeking to enjoin the enforcement of an order of the Interstate Commerce Commission, dated June 9, 1967, which permitted immediate consummation of the Penn-Central merger, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The three-judge United States District Court for the Southern District of New York issued two opinions,

dated July 3, 1967, and October 19, 1967, respectively, neither of which is yet reported. The opinion of July 3, 1967, dealt principally with procedural aspects of the case and is reprinted here as Appendix A. The district court's opinion on the merits of the case, dated October 19, 1967, is reprinted here as Appendix B. The report and order of the Interstate Commerce Commission, dated June 9, 1967, are reported at 330 I.C.C. 328. Copies of this report have been lodged with the Clerk. The Commission's two previous reports and orders, dated April 6, 1966, and September 16, 1966, are reported at 327 I.C.C. 475 and 328 I.C.C. 304, respectively.

Jurisdiction

This suit was brought under Title 5, U.S.C. § 704 and Title 28, U.S.C. §§ 1336, 2284 and 2321-25, to annul and set aside an order of the Interstate Commerce Commission dated June 9, 1967, and to obtain injunctive relief. The order of the district court dismissing the complaint was entered on October 19, 1967. Notice of appeal was filed in that court on October 31, 1967. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, U.S.C. §§ 1253 and 2101 (b).

Questions Presented

The Commission has ordered consummation of the Penn-Central merger on the assumption that its order in the *Inclusion* case will be upheld, and that this order will bring about the inclusion in N&W of EL, D&H and B&M, the three railroads protected by the conditions of Appendix G, and thus preserve their essential services for the public. The *Inclusion* order is the subject of an

appeal pending in this Court, and it is now apparent, as the district court itself recognized, that the B&M, and possibly also the D&H, will not be included in N&W even if the Inclusion order were to be affirmed. Under these circumstances, the following questions are presented:

1. Did the Commission's order permitting immediate consummation of the Penn-Central merger satisfy the mandate of this Court requiring that the ultimate fate of these roads be determined prior to consummation of the merger?

2. Did the district court violate the rule in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), in upholding an order of the Commission permitting immediate consummation of the Penn-Central merger on the assumption that all three of the protected lines would be included in N&W, even though it recognized that at least one railroad will not be included under the order?

3. Did the Commission violate the requirements of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c)) when it failed to make any findings which would support either the absorption of one or more of the protected lines into Penn-Central or the indefinite dependence of one or more of those lines on a Penn-Central indemnity—the only alternatives if the fate of all the protected lines is not determined prior to the consummation of the Penn-Central merger?

4. Did the Commission violate Section 5(2) of the Interstate Commerce Act (49 U.S.C. § 5 (2)) when it failed to make findings that, under Appendix G, the harm to the public interest and to the unpro-

tected railroads would be outweighed by the benefits to be realized from the merger in light of the now-established fact that the Appendix G conditions will have an indefinite duration?

5. Did the Appendix G conditions create a pooling arrangement within the scope of Section 5(1) of the Interstate Commerce Act (49 U.S.C. § 5(1)), and, if so, did the Commission make the findings required by that section for approval of a pool?

Statutes Involved

The statutes involved in this case are: Administrative Procedure Act, Sections 8(b), 10(c), 10(d), 10(e); 5 U.S.C. §§ 557(c), 704, 705, 706; Judicial Code, 28 U.S.C. §§ 1253, 1336, 2101(b), 2284, 2321-25; Interstate Commerce Act, Sections 5(1), 5(2), 5(9); 49 U.S.C. §§ 5(1), 5(2), 5(9). The text of these statutes is attached hereto as Appendix C.

Statement

This action to enjoin consummation of the merger between the Pennsylvania and New York Central Railroads is before this Court for the second time. Two prior orders of the Commission, dated April 6, 1966, and September 16, 1966, which would have permitted consummation of the merger last year, were enjoined pursuant to the decision of this Court dated March 27, 1967, in *Baltimore & Ohio R. Co.* v. *United States*, 386 U.S. 372 (1967). The present order, authorizing consummation of the merger on or after July 17, 1967, was issued by the Interstate Commerce Commission on June 9, 1967. By order of July 3, 1967, the United

States District Court for the Southern District of New York temporarily enjoined this latest order of the Commission. However, by decision dated October 19, 1967, that court dismissed the complaints attacking the Commission's order of June 9, 1967.

In its two previous reports and orders, the Commission recognized that consummation of the Penn-Central merger would have serious adverse effects upon the Erie-Lackawanna, Delaware & Hudson and Boston & Maine railroads (327 I.C.C. at 529; 328 I.C.C. at 311). In its original report, the Commission stated (327 I.C.C. at 529, 532):

> "The service the three petitioners render their shippers is essential and the public interest dictates that it be preserved. Unless somehow protected, through inclusion herein or by some other equitable means, the petitioners would be adversely affected by the proposed merger to a serious degree and would be severely handicapped in providing required transportation to the highly industrialized areas they serve."
>
> * * *
>
> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged, and, unless they are protected during the period necessary to determine their future, we would not authorize consummation at this time, even though approving the merger."

The Commission approved immediate consummation of the merger in its original report notwithstanding the

serious adverse effects which the merger would have upon EL, D&H and B&M only because it concluded that these three railroads could be protected against the effects of the merger through a set of protective conditions attached to its order as Appendix G. However, in its decision of March 27, 1967, this Court held that the Commission should have decided "the ultimate fate of the protected roads" before consummation of the merger, rather than relying solely upon protective conditions (386 U.S. at 378). The Court stated that once the protected railroads were included in a major system, "there would be no occasion for the conditions of Appendix G being imposed and hearing and decision on this highly controversial matter would not be necessary . . ." (386 U.S. at 390).

Upon remand the Commission recognized this central aspect of this Court's holding. Although the Commission had already completed hearings on the Appendix G conditions and that matter was at issue and ready for decision, the Commission withheld action until it had also decided the *Inclusion* case, in which EL, D&H and B&M had petitioned for inclusion in N&W.

On June 9, 1967, the Commission decided the *Inclusion* case, holding that the petition of each of these railroads for inclusion in the N&W system should be granted on specified terms and conditions. At the same time, the Commission issued its report and order in this case, permitting consummation of the merger and reinstating, in modified form, the protective conditions which

had been prescribed in the original report. However, the Commission made it plain that the protective conditions were not regarded as a substitute for determination of the ultimate fate of the protected railroads in the *Inclusion* case. Instead, the Commission expressly limited the function of the conditions to serving as an adjunct to the *Inclusion* order by protecting EL, D&H and B&M during any "post merger interim before the said inclusion . . ." (330 I.C.C. at 329)—an interim which the Commission found would be "relatively short" (330 I.C.C. at 350).

In the district court, appellants attacked the Commission's new order permitting consummation of the Penn-Central merger principally upon the ground that it was based upon a mistaken assumption of fact—specifically that the Commission's *Inclusion* order in fact constituted a determination of the ultimate fate of EL, D&H and B&M. Appellants pointed out that the *Inclusion* order had been attacked in court, both by the N&W and the B&M, and that if the order were set aside, it would not under any circumstances determine the ultimate fate of the protected railroads. And appellants further showed that the *Inclusion* order did not constitute a determination of the ultimate fate of EL, D&H and B&M in any case, because the *Inclusion* order would not produce the actual inclusion of at least one, and possibly two, of those railroads even if the order were upheld on judicial review.

Although the stockholders of EL voted to accept the *Inclusion* order before it had been reviewed by the district court, neither D&H nor B&M has submitted the pre-

scribed terms and conditions to its stockholders. B&M has indicated that it has no intention of recommending approval of the prescribed terms.[1] And D&H's chief executive, Mr. Dumaine, has indicated that, far from automatically accepting the *Inclusion* order, he is actively exploring alternatives to such inclusion.[2] Mr. Dumaine's consideration of the alternatives, including possible inclusion in the Penn-Central system, is especially important since he represents the D&H's principal stockholder, and an affirmative vote of the stockholders representing two-thirds of the outstanding stock is necessary in order to accomplish inclusion.

In its opinion of October 19, 1967, the district court conceded that the *Inclusion* order will not constitute a

---

[1]B&M has expressly stated that it would prefer denial of its petition for inclusion to accepting the terms prescribed by the Commission (Brief of B&M in Delaware and Hudson vs. United States, S.D.N.Y. No. 67 Civ. 2451, dated September 5, 1967, p. 4):

> "If the Commission is correct in its evaluation of B&M then B&M's Petition for Inclusion should have been denied . . ."

The reason B&M has taken this position is clear. Recent market prices for B&M stock, which turned over 200% in a single year, are highly inflated, far beyond even the price set for the stock in the *Inclusion* case. As Witness Lenz, Executive Vice President of Merrill Lynch, Pierce Fenner & Smith Incorporated, testified (F. D. No. 21510, Ex. N&W-6, p. 6):

> ". . . B&M common and preferred stocks have no significant value . . . . The inflation of the stock prices, in my judgment, is due primarily to the speculative possibility of inclusion in a profitable Eastern rail system and the current proxy fight being waged for control of B&M. In the absence of these factors, B&M stocks would have only nominal value."

[2]President Dumaine informed D&H's stockholders in a letter, dated August 21, 1967 (Bensel affidavit of 9/5/67, p. 8) that the Board would continue to explore "other alternatives that may be available to D&H" prior to presenting the matter to the stockholders. Mr. Dumaine subsequently made it plain in an interview with the *Wall Street Journal* that one of the alternatives he had in mind was that "D&H should become part of the merged Pennsy-Central" (Bensel affidavit of 9/5/67, pp. 8-9).

determination of the ultimate fate of all three of the protected railroads. Although the court, despite the explicit statements of D&H's chief executive to the contrary, refused "to take seriously the possibility that D&H stockholders will reject . . . the inclusion terms" (App. B, p. 66),[3] it admitted that "the situation as to B&M differs" from that of D&H (App. B, p. 67). The district court conceded that B&M would not be included in N&W under the *Inclusion* order because the stockholders of B&M will not accept the prescribed terms. Thus, in affirming the Commission's order, the district court found the factual premise upon which that order had been based to be incorrect.

The district court reviewed the Commission's order permitting consummation of the Penn-Central merger concurrently with its order in the *Inclusion* case, and, in its opinion of October 19, 1967, upheld both these orders. With respect to the *Merger* order, the district court relied primarily upon the fact that it had found the *Inclusion* order to be lawful. Although the district court conceded that its decision in the *Inclusion* case had been a difficult one and that the Commission's report in that

[3]The district court relied upon a statement by counsel for the D&H that the D&H Board "unanimously resolved that the D&H would recommend inclusion terms as fixed by the Commission" (Tr. 9/28/67, p. 150). However, D&H counsel was careful to point out that the D&H stockholders might "not accept the terms" and that therefore an alternative system was a "possibility." The statement of D&H counsel thus did not dispel the doubt that D&H will accept inclusion in N&W. In the light of Mr. Dumaine's statements, that doubt cannot be dispelled, unless, instead of speculating about the outcome of the D&H stockholder vote, this question is determined by ordering the vote to be taken, as these appellants have urged.

case was not a model of "logical perfection" (App. B, p. 49), it nonetheless concluded that this Court was unlikely to reverse its decision (App. B, p. 69). To the extent that it recognized that the *Inclusion* order would not take care of all of the problems created by the merger, the district court relied upon its conclusion that protective conditions had been prescribed which could be maintained in effect indefinitely. Thus, instead of adhering to this Court's direction that the ultimate fate of the protected roads—that is, their inclusion in a major system—should be decided *prior* to consummation of the merger, the district court held that the "Appendix G conditions take sufficient care" of the protected roads "while they work out their future" *following* the consummation of the merger (App. B, p. 68).

The Questions Presented Are Substantial

Concurrently with the appeal in this case, N&W is filing an appeal from the decision of the district court upholding the *Inclusion* order. If the *Inclusion* order is set aside, the order permitting consummation of the merger must also be set aside. But even if the *Inclusion* order is upheld, the order in the *Merger* case cannot stand, for it is now clear that the Commission's order in the *Inclusion* case will not determine the ultimate fate of all three of the protected railroads. Although the district court has refused to recognize that the problem exists with respect to the D&H, the fact is that there remains a serious doubt that the stockholders of D&H will accept the *Inclusion* order. And, in any event, it is now clear, and the district court has implicitly so found,

that even if the Commission's present order permitting immediate consummation of the Penn-Central merger becomes effective, B&M will remain outside of any major system even though the Commission has found that it will thereby be threatened with destruction. The questions raised by this appeal each relate to this established fact. As will be shown below, each of these questions presents a substantial issue which merits the consideration of this Court.

I. AS INTERPRETED BY THE DISTRICT COURT, THE COMMISSION'S ORDER OF JUNE 9, 1967, IS IN CONFLICT WITH THE MANDATE OF THE SUPREME COURT.

In enjoining consummation of the Penn-Central merger pursuant to the Commission's orders of April 6, 1966, and September 16, 1966, this Court made it clear that the Commission could not properly permit the merger to go through until the permanent home of the three protected carriers had been finally determined (386 U.S. at 378, 390):

> "We believe that the Commission erred in approving the immediate consummation of the merger without determining the ultimate fate of the protected roads."
>
> * * *
>
> "[I]t is necessary that the decision as to the future of the protected roads *and their inclusion in a major system be decided prior to consummation of the Penn-Central merger.*" (Emphasis added.)

In view of this holding, the Commission plainly erred in ordering consummation of the merger before its decision in the *Inclusion* case had been reviewed judicially, for the "determination" required by this Court necessarily encompassed any review proceedings in the *Inclusion* case (386 U.S. at 392):

> "If its [the Commission's] order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties."[4]

If the *Inclusion* order is reversed by this Court, no valid determination of the ultimate fate of the protected roads will have been made, and, in that event, the mandate of this Court will in no sense have been satisfied. As the United States has said (Memorandum for the United States on Further Injunctive Relief, 66 Civ. No. 2860, et al., S.D.N.Y., p. 5):

> "Should the Court set aside the *Inclusion* order on other than purely technical grounds, we would be as far from a 'decision as to the future of the protected roads' which is a pre-condition to consummation of the merger (386 U.S. at 390), as we were when the Supreme Court spoke in March."

Moreover, even if the *Inclusion* order is affirmed, the future of the protected roads will be as far from decision

[4]There is no dispute that the review of the Commission's orders has been expedited to the fullest extent, and appellants in their Motion to Advance, filed contemporaneously with this Statement, have requested an expedited schedule before this Court.

as it was when this Court spoke in March, since it is now clear that at least one of the protected railroads will not accept the terms of that order. The Commission's basic finding in this case was that consummation of the Penn-Central merger would threaten the continued viability of EL, D&H and B&M, and should not be permitted unless their ability to provide essential rail services was assured (327 I.C.C. at 529). This Court's requirement that the inclusion of these three railroads in a major system be determined prior to consummation of the merger thus gave effect to the solution which the Commission itself had recognized was necessary to meet the problems which the Penn-Central merger would create for EL, D&H and B&M (327 I.C.C. at 532):

> "It is doubtful that, without inclusion in a major system, these three carriers could withstand the competition of the applicants merged. . . ."

The Commission has never receded from this basic finding. However, because of its assumption that inclusion of the protected railroads in N&W was imminent, the Commission refused to consider any other steps necessary to ensure that the future of the protected roads would be determined prior to the consummation of the Penn-Central merger. As a result, the Commission's order of June 9, 1967, directly conflicts with the mandate of the Supreme Court.

There are two "major systems" in which the Commission could have ordered the protected roads to be included: (1) the N&W system (in its present form, or merged with C&O), or (2) the Penn-Central system.

If the Commission had decided which *one* of these systems was to be the home of the protected roads while foreclosing entrance into the other, its determination would have been effective. The stockholders of the protected roads would then have been obliged, as the only alternative to destruction by Penn-Central, to accept equitable terms from *the* system in which the Commission found their inclusion to be in the public interest.

The Commission failed to follow this course. By leaving open the alternative of ultimate inclusion in Penn-Central, the Commission has allowed B&M, and D&H if it so chooses, to refuse the terms of the *Inclusion* order and to shop with Penn-Central for even more favorable financial terms. Assuming that the indemnity, which these railroads would receive from Penn-Central as compensation for loss of traffic, would satisfy the financial interest of their stockholders, such an indemnity would not serve the public interest in preserving the traffic needed to maintain these railroads as competitors of Penn-Central.[8]

As a result, the "ultimate fate" of these lines is no closer to determination than when this case was before this Court last March. Under the Commission's own findings, all three of these lines must be placed in a major system if their transportation services are to survive. If they are not to be part of N&W, in what system, if any, should they be included? Plainly, some further determination will be necessary before the ultimate fate of these lines can be known; and this

[8]By leaving open to B&M and D&H the possibility of inclusion in Penn-Central, the Commission put the stockholders of these railroads in a position in which they could afford to reject inclusion in N&W. The efficacy of the *Inclusion* order was thus destroyed, not because of the already-inflated price the Commission set on their inclusion in N&W, but because the Commission refused to close the door on their entering Penn-Central.

Court has directed that the merger be stayed until this determination is made.

II. THE DISTRICT COURT ERRED IN AFFIRMING THE ORDER OF JUNE 9, 1967, ON A GROUND ENTIRELY DIFFERENT FROM THAT RELIED UPON BY THE COMMISSION.

Although it recognized that the ultimate fate of the protected lines had not been determined, the district court upheld the Commission's order permitting consummation of the merger on the ground that the "Appendix G conditions take sufficient care of them [the protected roads] *while they work out their future*" (App. B, p. 68; emphasis added). As already shown above, this holding is in direct conflict with the mandate of this Court, since that mandate requires that the future of the protected lines be authoritatively determined prior to the merger, not that they be given some traffic and revenue protection while they attempt to work out their future at some date after the merger. Moreover, apart from the mandate, this aspect of the district court's decision must be reversed, since the basis of the district court's action differs fundamentally from that of the underlying Commission order which it upheld.

The Commission expressly predicated its order in the *Merger* case on the assumption that the *Inclusion* order would be accepted by all three of the protected railroads. At the outset of its report, the Commission described the Appendix G protective conditions as designed only to provide "interim protection" pending inclusion (330 I.C.C. at 329). Later, in discussing the

substantive aspects of the protective conditions, the Commission repeated this description of the limited purpose of the conditions, stressing the fact that in its view "the protective period will be relatively short" (330 I.C.C. at 350). This same factual assumption was stated in dealing with the position of the unprotected lines. The Commission held that the fears of those lines that EL, D&H and B&M would join with Penn-Central to divert traffic from them were baseless because the protected lines "expect to become affiliates of N&W" (330 I.C.C. at 355). Nowhere does the Commission's report deal with the possibility that one or more of the protected lines might *not* become an affiliate of N&W, that it might reject the *Inclusion* order, or that the Appendix G conditions might have to be in effect for a period far beyond the short interim that would have been necessary to handle the mechanics of inclusion. In short, the Commission's report is based upon a factual premise which is precisely contrary to that adopted and relied upon by the district court, which held that EL, D&H and B&M could be protected indefinitely by Appendix G while they work out their future.

In *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), this Court stated:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds

> are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

It was for the Commission, not the district court, to decide in the first instance whether an arrangement of indefinite duration like that created by Appendix G is in the public interest. In upholding the Commission's order on its own theories without regard to findings in the Commission's report, the district court has plainly propelled itself "into the domain which Congress has set aside exclusively for the administrative agency" in precisely the manner condemned by this Court in *Chenery* (332 U.S. at 196). The fact that the Commission found the Appendix G conditions to be in the public interest for the brief interim required for judicial review and ministerial corporate functions (330 I.C.C. at 329) cannot be stretched to condone the arrangement on an indefinite or even permanent basis, particularly where the Commission explicitly relied upon the interim nature of the conditions to justify their use as an aid to the effectuation of the *Inclusion* order. The plain fact is that it is the district court, not the Commission, which has found that imposition of the Appendix G conditions for an indefinite period would be in the public interest, and that is a finding which the district court has no power to make.

The district court's error stems from its extremely restricted view of the *Chenery* principle, which it construes as precluding a reviewing court only from affirming an agency decision for reasons which it believes "the agency might not embrace" (App. B, p. 69). Its interpretation makes wholly irrelevant the question of whether or not the agency actually relied on those reasons. Under this view, which the district court seeks to support by reliance

upon this Court's decision in *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 248 (1964), the courts would be free, despite *Chenery*, to supply findings missing from an administrative agency's report so long as those findings are consistent with the Commission's ultimate conclusion. Thus, the district court apparently felt itself free to find that an Appendix G arrangement of indefinite duration is in the public interest because such a finding is consistent with the Commission's ultimate conclusion in the case—that immediate consummation of the Penn-Central merger is in the public interest. There is no other way in which that ultimate conclusion could be supported.

The district court's view of the *Chenery* principle would render that principle practically meaningless and make the reasoning and findings underlying an agency's ultimate conclusions mere window dressing. If a court finds that the administrative agency has not stated findings which support its conclusion, the agency may well decide to adhere to its findings and alter its conclusion upon remand. But it is for the Commission, not the courts, both to make findings and to decide what conclusions flow from them. This Court recognized this very point when it refused to permit Board counsel to provide a rationale for administrative action in *Labor Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965):

> "For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which

> Congress has set aside exclusively for the administrative agency.' *Securities & Exchange Comm'n* v. *Chenery Corp, supra*, at 196."

Thus, the Court held that whether or not findings might be devised to support agency action, and regardless of whether the administrative agency itself might conceivably adopt such findings, a court cannot affirm the agency's action unless those findings have in fact been made by the agency.

The same reasoning requires rejection of the rationale offered by the district court to support the Commission's ultimate conclusion that immediate consummation of the Penn-Central merger is in the public interest. Whether or not the Commission's conclusion might have been supported by prescribing an Appendix G arrangement to protect EL, D&H and B&M while they work out their future, the Commission did not prescribe Appendix G for that purpose. The court's task is to review the Commission's order on the basis upon which it was made, and, on that basis, the order here cannot be upheld.

III. THE COMMISSION HAS NEVER PASSED UPON THE CLAIM THAT APPENDIX G CONDITIONS OF INDEFINITE DURATION WILL SUBSTANTIALLY INJURE THE UNPROTECTED EASTERN RAILROADS.

Throughout the proceedings subsequent to the issuance of the Commission's original report, which had imposed the Appendix G conditions without notice

or hearing, the unprotected railroads have urged that such conditions are contrary to the public interest. Immediately upon the issuance of that report, the unprotected railroads pointed out that Appendix G would eliminate competition between Penn-Central and the protected railroads by creating a revenue pool. Subsequently at the hearings held by the Commission, this contention was thoroughly documented by the testimony of Dr. Merton J. Peck, Chairman of the Department of Economics at Yale University (FH-42, pp. 8-9):

> "The indemnity plan has the essential features of revenue sharing systems. The participants in each of the three revenue sharing systems involved have an interest in expanding the total revenue of those in that system at the expense of non-participants. The participants in each of the revenue sharing systems also have less incentive to expand their own sales at the expense of the other party in their revenue sharing system."

The unprotected railroads also demonstrated the injury to which they would be subjected by the Appendix G conditions. Thus, it was shown that the community of financial interest created between Penn-Central and the protected carriers would, over a period of time, induce each of these lines to route traffic away from the unprotected lines to increase the size of the revenue pool in which they would share. Moreover, it was pointed out that Penn-Central's temporary indemnity payments to the protected lines would tend ultimately to force the protected lines into the Penn-Central system. In view of the fact that the payments would terminate

upon their inclusion in another system, only Penn-Central would be in a position to deal with the protected lines on a basis which would include the value of such payments.

In its report in this case, the Commission rejected each of these contentions, but it did so on the express ground that harm to the public and to the other Eastern railroads could not result because Appendix G would be in effect only for a "relatively short" period of time (330 I.C.C. at 350) and that, during this period, the protected lines' action would not be influenced by Appendix G because they would "expect to become affiliates of N&W" (330 I.C.C. at 355).[6] However, it is now plain that neither of these reasons has any application to the situation as it will exist if the Commission's order becomes effective. The protective period will not be "relatively short" since, under the district court's own holding, it must continue while at least one, and possibly two, of the protected lines "work out their future" (App. B, p. 68). And during a period when the railroads protected by Appendix G are shopping for inclusion in Penn-Central, they cannot be regarded as expecting "to become affiliates of N&W."

The failure of the Commission to deal in any way with the facts that the protective period will be an ex-

[6]The district court was inconsistent in its treatment of the Appendix G conditions. When attempting to justify consummation of the merger despite the fact that B&M will not be included in N&W, the court treated the conditions as applying indefinitely "to take sufficient care of them [B&M] while they work out their future" (App. B, p. 68). However, when attempting to gloss over the injury these conditions will impose on the unprotected roads, the court characterized the conditions as "limited and temporary" (App. B, p. 13, n. 9), and assumed that all three of the protected roads will be "a permanent part of a strong N&W system" (App. B, p. 14).

tended one and that the protected lines will not be prospective affiliates of N&W plainly requires that the Commission's order be set aside. What will be the effect of the Appendix G conditions upon competition if those conditions remain in effect over a period of years? Will Appendix G cause a substantial diversion of traffic from the unprotected railroads over such a period of time?[7] How long will it take before the indemnity payments by Penn-Central to the protected lines mount to such a figure that their inclusion in any other major system will cease to be feasible?[8]

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[7] In rejecting the contention that the unprotected roads would be injured by the Appendix G conditions, the district court relied entirely upon the Commission's findings, which, as we have shown, were expressly based on the premise that the conditions would serve an interim function of relatively short duration. Neither the Commission nor the district court has ever found that the unprotected roads would not suffer diversion under an Appendix G of indefinite duration. Nor could such a finding be made. As the Government pointed out before this Court (Memorandum for the United States in *Baltimore & Ohio* v. *United States*, p. 27):

> "To give the three smaller roads a permanent stake in the financial success of Penn-Central would be almost like decreeing their affiliation with the Penn-Central system and thereby giving that system a virtual rail monopoly in New England and New York."

And B&M has made it plain what it could and would do if it were made an affiliate of Penn-Central (Brief of B&M in S.D.N.Y. 67 Civ. No. 2451, pp. 42-43):

> "If B&M were a member or ally of Penn-Central, B&M would obviously work together with that system for their joint benefit. EL, D&H and N&W would all suffer directly as the result of B&M's non-inclusion."

[8] The difficulty in working out the inclusion of any railroad receiving a temporary indemnity from Penn-Central in any system other than Penn-Central arises from the failure of the Commission to make provision for any sort of capital indemnity—a failure which even the district court conceded was "debatable" (App. B, p. 69). The district court nonetheless upheld this aspect of the Commission's order on the theory that the matter was academic in any event, since the traffic conditions of Appendix G are so stringent that Penn-Central will not "be able to divert a significant amount of traffic" from the protected lines (App. B, p. 17). As the district court pointed out, this is precisely what it held when the case was before it last year. But the court neglected to recognize that this was precisely the ground upon which its last decision was reversed by this Court (386 U.S. at 388).

Although Section 8(b) of the Administrative Procedure Act requires that "All decisions . . . shall . . . include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" (5 U.S.C. § 557(c)), there are no findings at all on any of these issues. Yet the issues are clearly material, since it is now clear that the Appendix G conditions will remain in effect indefinitely for at least one of the protected lines. Since it is well settled that the requirement of Section 8(b) is to be vigorously enforced, *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168 (1962), this absence of findings requires that the Commission's order here be set aside.

The statutory requirement that the Commission make findings as to the consequences of its action is particularly important here, for the inevitable consequence of the action taken is to turn any railroad which decides to reject inclusion in N&W into an ally of Penn-Central, both on a temporary basis as a direct result of Appendix G, and on a permanent basis because it will ultimately force that railroad's complete inclusion in Penn-Central. This consequence is a matter of the utmost importance, both to the other railroads operating in the East and to the public interest. As shown by the chart on the following page, the proposed Penn-Central system already occupies 48.3 percent of the Eastern railroad market. Moreover, inclusion of B&M in Penn-Central would create a monopoly of intercity rail service in New England, a fact which is important not only because it shows the direct anticompetitive consequences of inclusion of B&M in Penn-Central, but also because it

Present Shares of Eastern Railroad Market

	Railway Operating Revenues (1966)*	
	Dollars (Millions)	Percent of Total
PROPOSED PENN-CENTRAL SYSTEM		
Pennsylvania Railroad system	$ 997.9	25.9%
New York Central Railroad system	739.5	19.2
New Haven	125.6	3.2
Total Penn-Central system	$1,863.0	48.3
PROTECTED CARRIERS		
Erie-Lackawanna	$ 235.8	6.1
Delaware and Hudson	42.2	1.1
Boston and Maine	62.4	1.6
Total Penn-Central and Protected Carriers	$2,203.4	57.1%
UNPROTECTED CARRIERS		
Norfolk and Western system	$ 621.4	16.1
Chesapeake & Ohio-Baltimore & Ohio system	824.0	21.4
Reading	104.8	2.7
Central Railroad Company of New Jersey	53.4	1.4
Western Maryland	50.5	1.3

*As shown in reports filed with the Commission by the carriers and made a part of the administrative record in this proceeding.

indicates the reason why B&M refuses to accept terms which are anywhere near to equitable for inclusion in N&W. The profits to be derived from a New England monopoly would certainly be far greater than any value of B&M to N&W, and B&M intends to seek a price based upon such profits.[10]

Plainly, the inclusion of B&M, or both D&H and B&M, in Penn-Central would be harmful to every other railroad operating in the East. Even the district court seems to concede this (App. B, p. 18). But that court nonetheless refused to deal with the contention that the order here tends to force any railroad remaining independent into Penn-Central, saying (*ibid.*):

> "N&W is fully protected by its right to oppose inclusion of any of the three roads in Penn-Central."

This does not answer the basic problem. Of course, N&W and every other Eastern railroad could and doubtless would oppose inclusion of any of the protected lines in Penn-Central. However, that right is not sufficient to protect the interests of any of the unprotected lines.

The Commission would not be in a position to turn down any effort by a protected line to obtain inclusion in a major system. Having found that the service of these lines must be preserved and that these lines cannot

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[10] The court below relied on the illusory point that, by rejecting inclusion in N&W, B&M would lose the "right" to compel the Commission to include it into Penn-Central (App. B, p. 57). However, B&M is already on record that it plans to pursue such inclusion "by agreement voluntarily negotiated between the parties and approved by the Commission" (B&M Brief in S.D.N.Y. 66 Civ. No. 2860, p. 6).

survive as independent carriers after the Penn-Central merger is consummated, the Commission is hardly likely to preclude their inclusion in Penn-Central because of considerations of competitive balance. More likely, the Commission would hold that in these circumstances competitive considerations are outweighed by the benefits to be gained. Moreover, their inclusion in a major system is the only means of terminating the Appendix G conditions which deprive the public of many, if not substantially all, of the benefits which the Commission has found the Penn-Central merger will produce (see pp. 27-28, *infra*). Thus, the unprotected lines' only real chance to prevent inclusion of any of the protected lines in Penn-Central is to avoid the circumstances which make that inclusion the only feasible way to preserve the service of those railroads and to achieve the public benefits of the Penn-Central merger.

IV. BY FAILING TO DETERMINE WHETHER THE PENN-CENTRAL MERGER, CONDITIONED BY A PERMANENT APPENDIX G, IS IN THE PUBLIC INTEREST, THE COMMISSION VIOLATED SECTION 5 OF THE INTERSTATE COMMERCE ACT.

The substantial harm which is certain to result, both to the public interest and to other Eastern railroads, from consummation of the Penn-Central merger under circumstances which will require an indefinite continuation of the Appendix G conditions is only a part of the problem with which the Commission had to deal in this case. Section 5 of the Interstate Commerce Act does not preclude the imposition of harm upon other railroads, or even upon the public, if such harm

is outweighed by merger benefits which justify a finding that, overall, the merger with all of its terms and conditions is in the public interest.

The problem with the Commission's report and order in this case is that it makes no findings at all with respect to the public interest in consummating the merger so long as it must be subject to Appendix G for an indefinite period. As previously shown, in every one of its findings on the matter of the harm which will be inflicted by the merger, the Commission assumed that Appendix G would only be of short duration. The Commission's treatment of the other aspect of the problem—the benefits to be realized from the merger—is even more defective, for in this part of its report the Commission ignored the Appendix G conditions entirely. Thus, although the undisputed evidence of record showed that there could be no substantial merger savings or public benefits from the merger so long as it was conditioned by Appendix G, the Commission made no findings on this matter. Instead, it made no evaluation of the merger under Appendix G, and found simply that "the public interest requires that the applicants be permitted to commence achieving the substantial savings which their merger will make possible *at the earliest possible date*," and that "the shipping public should not be denied the improved service which *ultimately* the merged company can provide" (330 I.C.C. at 361; emphasis added).

These findings do not justify consummation of the merger under circumstances that will require a continuation, indefinitely and possibly even permanently, of conditions which preclude attaining those benefits. The district court recognized this defect but, instead of

remanding the case for necessary findings, the court made its own findings on the basis of its own concept of "common sense," stating that (App. B, p. 15):

> "Nothing in Appendix G prevents the realignment of management, the elimination of many duplications in personnel, the undertaking of financing, or the refurbishing and, in many cases, the implementation of plans for better and more economical service."

But these are not matters to be decided by "common sense" or judicial notice; they are matters of fact to be proved by evidence. And the undisputed evidence in the record shows that the district court's findings are not "common sense" at all. At the reopened hearings on Appendix G, N&W introduced evidence showing that under the prescribed conditions savings could not be achieved in any of the areas mentioned by the district court (FH-45). Penn and Central made no attempt to controvert this showing. Quite the contrary, the Pennsylvania's own witness admitted that "there is no chance of any substantial savings in the next two years" (Tr. 22344) and that "the first two million dollars we save as a result of the merger is a good five years away" (Tr. 22343).

We are thus left with an order of the Commission permitting consummation of the Penn-Central merger subject to the Appendix G conditions, despite the harm which would be inflicted upon the public and upon the unprotected railroads, without findings that there would be offsetting savings or service improvements in the foreseeable future. The Commission's order of June 9, 1967,

thus comes down to the very same attempted justification which was offered for the Commission's earlier orders of April 6, 1966, and September 16, 1966—that an effort must be made to save the New Haven railroad.

Although both the Commission (330 I.C.C. at 361) and the district court (App. B, p. 70) rely heavily on the plight of the New Haven, it seems plain in principle that a merger of the two largest railroads in the East cannot be justified merely because those railroads are willing to lend a bankrupt railroad some badly needed money as a device to obtain the right to merge. True, the New Haven is in serious financial difficulty. And true, the preservation of the services of that railroad are important to the many communities which it serves. But these needs do not justify giving Penn and Central an opportunity to buy the right to consummate their merger at the cost to the public interest of creating a huge financial combine which will dominate the Eastern railroad market.

Moreover, even if the plight of the New Haven were to be accorded some weight in this matter, it should be given consideration only in the context of the impact of the Penn-Central merger upon the entire railroad system in the East. As this Court pointed out last Term (386 U.S. at 392):

> "After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation."

There is not a scrap of evidence in this case or a single finding in the Commission's report which indicates that the Penn-Central merger can be "handled properly" if it must be accompanied by the conditions of Appendix G for the indefinite future.

Conclusion

For the foregoing reasons, probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

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